

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 01-0238
Gross Retail Tax—Tangible Personal Property
Tax Administration—Penalty
For Tax Years 1999-2000**

NOTICE: Under Indiana Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Retail Tax—Tangible Personal Property

<u>Authority:</u>	IC § 6-2.5-2-1	45 IAC 2.2-3-8
	IC § 6-2.5-4-9	45 IAC 2.2-4-21
	IC § 6-2.5-5-16	45 IAC 2.2-5-3
	IC § 6-8.1-5-1(b)	45 IAC 2.2-5-4
		45 IAC 2.2-5-24
		45 IAC 2.2-5-25

Taxpayer protests the assessment of Indiana's gross retail tax on sales of residential and industrial irrigation systems.

II. Tax Administration—Penalty

<u>Authority:</u>	IC § 6-8.1-10-2.1	45 IAC 15-11-2
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Taxpayer protests the assessment of the 10% penalty.

STATEMENT OF FACTS

Taxpayer sells, installs, and services irrigation systems throughout the west central area of Indiana. The Audit Division assessed the state's gross retail tax on the untaxed selling price of the irrigation equipment and parts. The Audit also assessed the 10% negligence penalty. Taxpayer protested, arguing that the irrigation systems are more properly classified as nontaxable real property rather than as taxable tangible personal property, and, that in some cases, tax had already been paid on the components.

I. Gross Retail Tax—Tangible Personal Property

DISCUSSION

Taxpayer protests the Audit Division's assessment of Indiana's gross retail tax on sales of residential and industrial irrigation systems. Taxpayer argues that Indiana's exemption statutes and regulations are outdated and make absurd distinctions between real and tangible personal property. Taxpayer argues that the equipment and parts he sells are more properly classified as real property, not tangible personal property, and therefore the retail transactions are not subject to Indiana's gross retail tax. At the hearing, taxpayer appeared to drop this argument in favor of providing copies of documents to show that invoices taxed as lump sum invoices had actually charged, collected, and remitted tax on parts sold during installation. Taxpayer has provided those documents as requested.

Under IC § 6-8.1-5-1(b), a "notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-2.5-2-1 imposes the "excise tax, known as the state gross retail tax . . . on retail transactions made in Indiana." Taxpayer is not arguing that the transactions are not retail transactions. Taxpayer is arguing that the items he sells are real property, not tangible personal property, and are therefore not subject to Indiana's gross retail tax.

45 IAC 2.2-3-8 provides as follows:

- (a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.
- (b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt.

Taxpayer argues that the equipment and parts he sells for installation and servicing of irrigation systems are more properly classified as real property and not tangible personal property. Taxpayer analogizes irrigation systems to above and in ground pools (real property) and fences (real property), and states that it is illogical to consider these items real property while irrigation systems, less easily removed than above-ground pools and fences, are classified as tangible personal property under Indiana's tax statutes and regulations. *See*, 45 IAC 2.2-4-21.

Taxpayer's argument is without merit. As 45 IAC 2.2-3-8 states, "all sales of tangible personal property are taxable." The only difference lies in who pays the tax, taxpayer upon purchase of materials from a supplier, or his customers upon purchase of an irrigation system and installation from taxpayer.

The Audit Division's assessment is correct except for the transaction for which taxpayer has provided a valid exemption certificate for a sale to an Indiana instrumentality. *See*, 45 IAC 2.2-5-24 and 45 IAC 2.2-5-25; *see also* IC § 6-2.5-4-9 and IC § 6-2.5-5-16. In addition, those invoices previously taxed as lump sum invoices have shown that the state's gross retail tax was collected and remitted on the materials sold as part of an installation project. To the extent that taxpayer has shown the gross retail tax was collected and remitted, that part of the assessment is reversed.

FINDING

Taxpayer's protests regarding the assessment of the state's gross retail tax on tangible personal property, e.g., parts and equipment used to install and service irrigation systems, is sustained to the extent the documentation shows the state's gross retail tax was collected and remitted.

II. Tax Administration—Penalty

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty. Taxpayer argues that it had reasonable cause for failing to pay the appropriate amount of tax due, based solely on taxpayer's interpretation of the relevant statutes and regulations.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has failed to set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Although some of the questions raised by taxpayer involve technical issues of interpretation and applicability, given the totality of the circumstances, waiver of the penalty is inappropriate in this instance.

FINDING

Taxpayer's protest concerning the assessment of the 10% negligence penalty is denied.